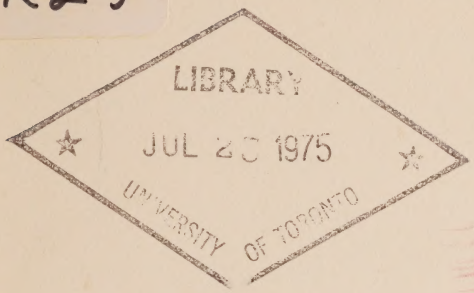
REPORT on the INTERNATIONAL CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF THE INTERNATIONAL WILL

Ontario Law Reform Commission



Ontario

Ministry of the Attorney General

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The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act* for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

H. Allan Leal, Q.C., LL.M., LL.D., *Chairman*
Honourable James C. McRuer, O.C., LL.D., D.C.L.
Honourable Richard A. Bell, P.C., Q.C.
W. Gibson Gray, Q.C.
William R. Poole, Q.C.

Lyle S. Fairbairn, B.A., LL.B., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the Sixteenth Floor at 18 King Street East, Toronto, Ontario, Canada.

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ONTARIO LAW REFORM COMMISSION

Sixteenth Floor
18 King Street East
Toronto, Ontario
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To The Honourable Robert S. Welch, Q.C., LL.D.,
Attorney General for Ontario.

Dear Mr. Attorney:

Pursuant to section 2(1) (a) of *The Ontario Law Reform Commission Act*, R.S.O. 1970, c. 321, the Commission initiated a study of the International Convention Providing a Uniform Law on the Form of the International Will drawn up by the Diplomatic Conference on Wills, Washington, D.C., October 16-26, 1973.

The Commission now submits its Report.

CHAPTER 1

INTRODUCTION

Testamentary succession with international characteristics is no new thing. The ownership by Canadian nationals and provincial domiciliaries of assets situated abroad is now commonplace and its incidence increasing. Conversely, the heterogeneity of our people and the attractions which this country offers to the foreign investor combine to make testamentary succession a matter of primary importance in private international law.

The rules of law affecting the essential or intrinsic validity of wills are so various and reflect to such a high degree the innate concepts of family and property in each particular state that any attempt at unification of these rules at the international level would appear to be beyond the realm of possibility. It was thought for some time that the existence of wide variation in the rules of law affecting the formal validity of wills would also prove to be an obstacle in the settling of a single form of will which would gain international acceptance, however desirable that result would be.

It was for this reason that states in their internal rules of law and by international convention sought to provide alternative forms of will-making which would be permitted on an equal basis with their own internal modes. The present section 19 of *The Wills Act*[1] provides that as regards the manner and formalities of making a will, so far as it relates to an interest in movables, a will made either in or out of Ontario is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where,

(a) the will was made; or

(b) the testator was domiciled when the will was made; or

(c) the testator had his domicile of origin.

The manner and formalities of making, so far as the will relates to an interest in land in Ontario, are governed by the formalities prescribed in section 11 of the Ontario *Wills Act*.

These rules of conflict of laws in Anglo-Canadian jurisdictions, representing a more ready acceptance of alternative modes of will-making, have had their counterpart in other jurisdictions and with the well-known exception that in Holland a holograph will made abroad by a person whose capacity is governed by Dutch law, will not be recognized, the rule *locus regit actum* (law of the place where the act is done) has been admitted without objection or reservation. A more liberal approach to the acceptance of alternative modes of will-making also led to the formulation of an international convention on the conflict of laws relating to the formal validity of testamentary dispositions in 1961. The convention of The Hague

[1] R.S.O. 1970, c. 499, s. 19(4). The progenitor of this legislation appeared in the Ontario *Wills Act* at the beginning of the present century and was, in turn, derived from the English *Wills Act, 1861* (Lord Kingsdown's Act).

Conference on Private International Law was concluded on October 5, 1961 and as of September 30, 1971 the Convention had been ratified by thirteen states: Austria, Botswana, France, German Federal Republic, Ireland, Japan, Mauritius, Poland, South Africa, Swaziland, Switzerland, the United Kingdom and Yugoslavia. Canada at that time was not a member of The Hague Conference. By the terms of the Convention a testator may make his will according to the law of the place where he makes his will, or according to the law of the state of which he is a national, at the time of the making of the will or at his death, or according to the law of the state where he is domiciled or has his habitual residence at the time the will is made or at his death, or when the will deals with an interest in immovables according to the law of the state where the immovables are situated.

This evidence of a more ready acceptance by the signatory states to The Hague Convention of alternative modes encouraged the belief that an attempt should be made to arrive at the removal of conflict of laws governing formal validity by the more direct route of providing a uniform law on the form of will. Not surprisingly this cause was espoused by the International Institute for the Unification of Private Law (Unidroit) and their efforts commencing in 1960 led to the concluding of the Convention Providing a Uniform Law on the Form of an International Will which is the subject of this report.

CHAPTER 2

HISTORICAL DEVELOPMENT OF THE CONVENTION AND UNIFORM LAW

In 1961 the Governing Council of Unidroit established the first Committee of Experts to draw up a draft convention to provide for a uniform law on the form of an international will. After three sessions, one in 1963 and two in 1965, the Committee submitted the first Draft Convention which was approved by the Governing Council in 1966 and submitted to the governments of the member states of Unidroit for comment.

The comments of governments were considered by a Committee of Governmental Experts convened by Unidroit in 1971. At the single session of this Committee, nineteen states sent representatives and three international organizations sent observers. The deliberations of the Committee resulted in a redraft of the Convention and Uniform Law and the supporting analytical text. This documentation together with the comments of governments thereon comprised the material for consideration by the Diplomatic Conference convened in Washington, D.C. on the invitation of the Government of the United States, on October 16-26, 1973. The governments of forty-two states, including Canada, were officially represented at the Washington Conference, six additional states were represented by observers, and observers also attended from five international organizations: The Council of Europe; The Hague Conference on Private International Law; the International Institute for the Unification of Private Law (Unidroit); the United Nations; and the International Union of Latin Notaries. The Canadian delegation was comprised of Mr. H. Allan Leal, Q.C., chief of the delegation, Mr. Kenneth Lloyd Burke, Legal Division, Department of External Affairs, and Mr. Jacques Roy, Civil Law Section, Department of Justice, Government of Canada.

After two weeks devoted to a clause by clause analysis of the draft Convention and the Uniform Law and having considered related matters, the Diplomatic Conference completed its work with the formulation and acceptance of the following documents:

1. A Convention making provision for a Uniform Law on the Form of the International Will. The Convention is open for signature at Washington from October 26, 1973 until December 3, 1974. As of January, 1974 it has been signed by the United States of America, the Republic of China (Taiwan), the Holy See, Iran, Laos and Sierra Leone. The Convention is annexed hereto as Appendix A;

2. An Annex to the Convention containing the text of the Uniform Law (Appendix A to this report); and

3. A resolution concerning a system of safekeeping for international wills. The resolution is annexed to this report as Appendix B.

Under the Convention each contracting state undertakes to introduce a new form of will called the "international will" into its law, in addition to the other existing forms of wills. In federal states such as Canada this undertaking must be read subject to the relevant federal state clause which provides for implementation by, and ratification on behalf of, the particular legislative unit having legislative competence with respect to wills. The contracting state also undertakes to recognize the formal validity of any

"international will" drawn up in conformity with the provisions of the uniform law. The will, drawn up in any language chosen by the testator, must be executed in the presence of two witnesses and of a person authorized to act in connection with international wills. The "persons authorized to act in connection with international wills" are to be designated by each contracting state (in Canada by the provinces) for its own territory. The authorized person is then obligated to draw up a certificate in the form presented by the uniform law of the facts concerning the making and execution of the will. The formalities prescribed for the execution of the will, apart from the added intervention of the authorized person, are strikingly similar to those prescribed under section 11 of *The Wills Act*. Indeed, where the common practice in Ontario of executing the will before a solicitor is observed, the signature by the solicitor and the completion of the certificate would comprise the only additional formalities required to give the document status as an "international will". These additional formalities are a very small price to pay in return for having the will accorded international formal recognition. It is also posited that it would be sound practice for all wills in Ontario to be executed in this form against the possibility that they could, if necessary, be given recognition as an international will even though the additional formalities would not be required for their formal validity as a domestic will.

The Resolution adopted by the Diplomatic Conference gives expression to a desideratum that is well recognized even with respect to domestic wills. Although perhaps not happily worded, the Resolution recommends in substance that the contracting states establish an internal system which would facilitate the safekeeping, search and discovery of international wills and their accompanying certificates. Reference is made to the Convention on the Establishment of a Scheme of Registration of Wills concluded at Basel, Switzerland on May 16, 1972. The Resolution also invites the contracting states to designate an authority or a service in charge of facilitating the exchange of information on these matters.

Some jurisdictions, such as the Province of Quebec, provide for compulsory registration of certain relevant information pertaining to the fact that a will has been made before a notary. This register facilitates *post mortem* inquiry without jeopardizing the essential privacy of this information during the testator's lifetime.

Some of the common law provinces have statutory provisions for the deposit of a will for safekeeping. These procedures are voluntary and are not used frequently. There is common ground that registration should not be a condition precedent to the validity of a will. But short of that there is ample scope for procedures to be fashioned both as to safekeeping the will itself and providing a ready reference after the death of the testator for information concerning the fact that a will has been made. The nature of the sanction for non-registration is a function of the degree of control which the governing body of the authorized persons may be in a position to exert. This, in the Province of Quebec, is exercised through the Board of Notaries and, in Ontario, with an integrated and fused legal profession it would be possible to exercise the necessary controls through the Law Society of Upper Canada, assuming that the members of that Society were designated as the authorized persons under the relevant legislation to act in connection with the international will.

CHAPTER 3

ANALYSIS OF THE PROVISIONS OF THE CONVENTION

Article I

1. Each Contracting Party undertakes that not later than six months after the date of entry into force of this Convention in respect of that Party it shall introduce into its law the rules regarding an international will set out in the Annex to this Convention.

2. Each Contracting Party may introduce the provisions of the Annex into its law either by reproducing the actual text, or by translating it into its official language or languages.

3. Each Contracting Party may introduce into its law such further provisions as are necessary to give the provisions of the Annex full effect in its territory.

4. Each Contracting Party shall submit to the Depositary Government the text of the rules introduced into its national law in order to implement the provisions of this Convention.

The obligation contained in Article I, paragraph 1, must be read with the provisions of Article XI and, as far as Canada is concerned, Article XIV. Article XI provides that the Convention shall enter into force six months after the date of deposit of the fifth instrument of ratification or accession. For those states ratifying after the fifth instrument of ratification, the Convention shall enter into force six months after the deposit of their own instrument of ratification.

The provisions of the federal state clause in Article XIV enables Canada to ratify the Convention on behalf of one or more of the provinces.[2] It would appear, therefore, that Canada could ratify the Convention after any one province had enacted the Uniform Law annexed to the Convention, and the Convention would enter into force with respect to that province six months after the instrument of ratification had been deposited with the Depositary Government which, under the Convention, is the Government of the United States.

The provisions of paragraph 3 of Article I were added to the draft Convention by the Conference for the purpose of enabling any given state to add the necessary provisions to the text of the Uniform Law, in accordance with its own style of legislation, to complete the legislative scheme and make the Uniform Law fully effective in its own jurisdiction. This paragraph represents a compromise to avoid the strictures of paragraph 2 as originally drafted. The provisions of paragraph 4 were also added by the Conference and are necessary for purposes of information in view of the addition of paragraph 3.

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[2]For a full discussion of the federal state clauses in the Convention see page 8, *infra*.

Article II

1. Each Contracting Party shall implement the provisions of the Annex in its law, within the period provided for in the preceding article, by designating the persons who, in its territory, shall be authorized to act in connection with international wills. It may also designate as a person authorized to act with regard to its nationals its diplomatic or consular agents abroad insofar as the local law does not prohibit it.

2. The Party shall notify such designation, as well as any modifications thereof, to the Depositary Government.

Article II, paragraph 1, provides that the persons authorized to act in connection with international wills shall be designated by the contracting state on ratification. Presumably, in Canada, this is a matter for the individual provinces. This would appear to cause no difficulty in the Province of Ontario, inasmuch as the existence of an integrated and fused legal profession makes all legal practitioners members of the Law Society of Upper Canada and subject to its control. It is commonplace to have a will executed before the solicitor who drafted it and, accordingly, the additional formalities impose no undue hardship.

The second sentence of paragraph 1 of Article II was added to the draft Convention by the Conference since it is not unusual with many states to have their diplomatic and consular officials perform these duties abroad with respect to their own nationals. It is to be observed, however, that this extension of the office of authorized persons is subject to any overriding prohibition of the local law in the place where the act is done. An attempt to extend the jurisdiction to act as an authorized person to ships' captains, airline pilots and the like, was rejected by the Conference after full debate. It would appear that this service of attending upon the execution of wills of Canadian nationals is not provided at the present time by Canadian diplomatic or consular agents abroad and if it is thought to be desirable then a change in current practice would have to be authorized by the Department of External Affairs, Canada.

In accordance with the provisions of paragraph 2, Article II, each contracting state is obligated to notify the Depositary Government the designation of those who are authorized to act in connection with the internal will in its jurisdiction(s).

Article III

The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a Contracting Party, shall be recognized in the territory of the other Contracting Parties.

This article in the draft Convention in paragraph 2 provided for the recognition, in limited circumstances, of an international will made in a non-contracting state. The Conference deleted this provision and the force of the Convention is now limited to international wills made in contracting states.

Article IV

The effectiveness of the certificate provided for in Article 10 of the Annex shall be recognized in the territories of all Contracting Parties.

The use of the word "effectiveness" in the English text of Article IV and, indeed, the use of the word "valeur" in the French text may seem a little strange to parliamentary draftsmen. It is simply illustrative of the many compromises in drafting that must be made when establishing the text of a multi-lateral and multi-lingual treaty or convention. It is probably meant to convey in English "validity and effect".

Article V

1. The conditions requisite to acting as a witness of an international will shall be governed by the law under which the authorized person was designated. The same rule shall apply as regards an interpreter who is called upon to act.

2. Nonetheless no one shall be disqualified to act as a witness of an international will solely because he is an alien.

Since the presence of two witnesses is required under Article 4 of the Uniform Law, the question of the qualification to act as a witness had to be faced. The existence of wide variations in the provisions of the law governing capacity to act as a witness would have rendered unification of these rules difficult to achieve. The draft Convention in Article V provided that the question of capacity to act as a witness should be governed by the law of the place where the will was executed, subject to the stipulation that no witness would be disqualified solely because he is an alien. This choice of law rule was amended by the Conference and in both Article V of the Convention and in the text of the certificate reference is made to the applicable law being the law under which the authorized person was designated. This may cause difficulty in those cases where a diplomatic or consular agent abroad undertakes to act as an authorized person since a witness, in these circumstances, might well qualify under the rules of the local law but not under those of the agent.[3]

The draft Convention was amended by the Washington Conference to delete the word "internal" where it appeared in Article V, and subsequently throughout the Convention, to ensure that the reference to the "law" of the forum would also include its choice of law rules.

The provision with respect to interpreters was added since there is no prescription that the will be drafted in the language used by the testator and, in the event that it is not, the will would have to be translated or interpreted for him. The word "interpreter" in this context is referable to the matter of linguistics and not to the question of the proper construction to be placed upon the words used in the will.

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[3]For a full discussion see Nadelmann, The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of the International Will (1974), 22 American Journal of Comparative Law 365 at 372.

Article VI

1. The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.

2. Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

The provisions of paragraph 2, Article VI, of the draft Convention were altered by the Conference to make it clear that although legalization of the signature of the testator, of the authorized person and that of the witnesses is not required in the first instance, the courts or other competent authorities in the receiving states might require further evidence of the authenticity of the signatures, where the genuineness of the signature was placed in issue, without being in breach of the treaty obligations.

Article VII

The safekeeping of an international will shall be governed by the law under which the authorized person was designated.

This article does not appear in the first drafts of the Convention. The matter of a scheme for safekeeping of the international will was raised at the Washington Conference and much debate was engendered by the suggestion that such a scheme should be made mandatory. In the end it was decided that this was a matter to be determined by the law of the place under which the authorized person was designated. The Conference strongly favoured the establishment in each state of a scheme for safekeeping, but the wording of the Resolution is framed in precatory language and, of course, it does not form part of the Convention or the Uniform Law.

The Final Clauses

Articles IX to XVI comprise the so-called Final Clauses. Reference has already been made to Articles IX, XI and XIV and their special significance on ratification by federal states, such as Canada, where legislative competence concerning the subject matter of the Convention lies with the territorial units comprising the federation.

The application of treaty provisions to states with two or more territorial units in which different systems of law pertain can raise special problems on ratification and implemention. The diversity of systems is a function of the distribution of legislative powers under the organic constitutional statute, with us the *British North America Act*, and not of systems of law in generic terms such as that of the civil and common law. The formulation of a federal state clause acceptable to Canada, in the sense of permitting more ready participation in international treaties and conventions, became more critical as a result of our assuming membership in The Hague Conference on Private International Law in 1968.

There was, of course, no difficulty so long as the subject matter of the particular convention concerned any area within the sole legislative competence of the Parliament of Canada. Illustrative of this type of situation is The Hague Convention on the Recognition of Divorces and Legal Separations concluded on June 1, 1970, though even in this instance there may be some doubt so far as legal separations are concerned. But in Article 23 of that Convention it is provided that if a Contracting State has more than one legal system in matters of divorce or legal separation, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its legal systems or only to one or more of them, and may modify its declaration by submitting another declaration at any time thereafter. It would appear, therefore, that this particular Convention would cause no difficulty on ratification by Canada even though it might be settled that legislative jurisdiction with relation to legal separations was a matter for the provincial legislatures. Under this federal state clause the federal government would be enabled to ratify with respect to legal separations on behalf of those provinces desiring to implement and participate. It is clear from a statement of the Conference in October, 1972, requested by Canada, that the diversity of legal systems dealt with in Article 23 is a diversity based on a split of legislative competence involving subject matter.

A clear case of mixed federal and provincial jurisdiction based on the nature of the subject matter is found with respect to The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which was concluded on March 18, 1970 since the evidentiary problem may involve either a subject matter solely within the legislative competence of Parliament or within that of the provincial legislatures.

Finally, the subject matter of the particular Convention may lie entirely within the legislative competence of the provincial legislatures. An illustration of this type of convention is found in The Hague Convention of 1968 Concerning the International Administration of Estates of Deceased Persons. Article 35 of this Convention, which was the result of direct intervention of members of the Canadian delegation, provides as follows:

> If a Contracting State has two or more territorial units in which different systems of law apply in relation to matters of estate administration, it may declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.
>
> These declarations shall state expressly the territorial units to which the Convention applies.
>
> Other Contracting States may decline to recognize a certificate if, at the date on which recognition is sought, the Convention is not applicable to the territorial unit in which the certificate was issued.

It will be appreciated that this federal state clause gives scope for the fullest recognition of the constitutional realities and the distribution of legislative powers in Canada. The same clause has been inserted in the Wills Convention as Article XIV in these terms:

Article XIV

1. If a State has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.

It is interesting to note that at the Washington Conference on Wills, opposition came from the Australian delegate who asserted incompatibility of Article XIV with the Australian system of internal division of jurisdiction.[4] The search for a formulation of a federal state clause that would be acceptable to all federal systems represented at the Conference failed and, in consequence, an additional article was inserted reading as follows:

Article XV

If a Contracting Party has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, any reference to the internal law of the place where the will is made or to the law under which the authorized person has been appointed to act in connection with international wills shall be construed in accordance with the constitutional system of the Party concerned.

In result, therefore, the way is open for the Province of Ontario to request ratification of the Convention by the Government of Canada on behalf of the Province and the Commission recommends that this be done.

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[4]See Nadelmann, *op. cit.*, p. 373.

CHAPTER 4

ANALYSIS OF THE PROVISIONS OF THE UNIFORM LAW

The Uniform Law on the Form of an International Will appears as the Annex to the Convention.

Article 1

1. A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.

2. The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

The opening words of this article make it clear that the Uniform Law concerns only the prerequisites for formal validity of a will. Not all breaches of the prescriptions of the Uniform Law will lead to the invalidity of the international will. The sanction of invalidity results only with respect to non-compliance with the formalities stipulated in Articles 2 to 5. These formalities are not dissimilar to the statutory prerequisites contained in section 11 of the Ontario *Wills Act* with the additional requirement that it is to be executed before a person authorized to act in connection with international wills and a stipulation of the role which the latter is to perform, including the completion of the certificate provided for in Article 9.

Paragraph 2 of Article 1 makes it clear that the invalidity of the document as an international will does not necessarily result in its invalidity as a domestic will of the forum.

Article 2

This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

This provision applying to joint wills was added by the Washington Conference. The joint will would appear to be a creature of the common law and they are not valid as to form in the Province of Quebec even with respect to a will "in English form" which is one executed in accordance with formalities identical with those contained in section 11 of *The Wills Act*. Joint wills or joint mutual wills are not at all uncommon in Ontario, but under the Uniform Law they cannot exist as valid international wills.

Article 3

1. The will shall be made in writing.
2. It need not be written by the testator himself.
3. It may be written in any language, by hand or by any other means.

The stipulation that the will shall be made in writing is in accordance with Ontario law and simply rules out nuncupative wills which are formally valid in some jurisdictions. Presumably since the text states that the will shall be made "in writing", and does not state that it is to be "in words", the jurisprudence which makes the will acceptable as to form when written in braille, when using the ditto device ("), or other common techniques, will not result in invalidity.

Article 4

1. The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.
2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

Again the provisions of this article, subject to the intervention of the authorized person, are familiar in Ontario law and common in other jurisdictions based on the English *Wills Act* of 1837.

Article 5

1. In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.
2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.
3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

Although the terms of this article appear inoffensive enough to one familiar with a will in so-called English form, they were, in fact, the subject of some controversy at the international Conference. In those jurisdictions, such as The Netherlands, which recognize the mystic will it is common practice for the will to be brought before the notary in a sealed envelope for execution. The desire to maintain the absolute secrecy of the will is recognized by the expedient of placing the necessary signatures on the envelope. The representatives of some jurisdictions were loath to surrender this privilege, being unconvinced that any secrecy as to contents could be realized without sealing the document up, but eventual agree-

ment was reached that the international will should carry the signature on the instrument itself.

Paragraph 2 of Article 5 did not appear in the original draft of this article. The developing African countries, due to a high level of illiteracy prevailing there, made a strong case for special provisions covering testators who are unable to sign. There are other reasons, of course, than illiteracy why a testator may be unable to sign and there was general agreement that this fact should not result in loss of testamentary power. A strong difference of opinion arose, however, as to whether the familiar practice in common law jurisdictions of allowing a third party to sign on behalf of the testator, and at his direction, would be acceptable to non-common law states. The civil law generally prohibits such a procedure, although the law of the U.S.S.R. is similar to the common law. In result, the common law practice was approved, if the law of the authorized person designated sanctioned such procedures.

Although it is not absolutely clear, it would appear from the text of Article 5 that all signatories must sign in the presence of all others. This is inferred, at least, from the use of the words "then and there" in the English text and "sur le champ" in the French text. Under Ontario law it is not necessary, although the usual practice, that witnesses sign in the presence of each other as long as the testator signs or acknowledges his signature in their joint presence and the witnesses individually sign in the presence of the testator.

Article 6

1. The signatures shall be placed at the end of the will.

2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

Article 7

1. The date of the will shall be the date of its signature by the authorized person.

2. This date shall be noted at the end of the will by the authorized person.

The compliance with the provisions of these two articles is not a condition precedent to the formal validity of the international will. They refer, for the most part, to matters which are frequently followed in practice in the engrossing and execution of wills in English form, but are not required by law. The one exception is that contained in paragraph 1 of Article 6 referable to the place of signature which is a condition precedent to formal validity in the common law provinces of Canada and in some other jurisdictions. Assuming, then, that the sigantures were not placed at the end of the will, or in terms of the domestic law of Ontario "at the foot or end thereof" in accordance with the provisions of section 11 of

The Wills Act, and again assuming compliance with all other formalities the will would be valid as an international will but not as a domestic Ontario will.

Article 8

> In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

The participants in the Washington Conference strongly supported the desirability of establishing, in all Contracting States, a system "to facilitate the safekeeping, search and discovery of an international will as well as the accompanying certificate". The Resolution, however, passed by the Conference and directed towards these ends does not form part of the Convention or the Uniform Law and is framed in precatory language only. Hence the provision in Article 8 to cover the situation where the jurisdiction under which the authorized person is empowered to act does not have a mandatory rule pertaining to the safekeeping of the will. The provisions of Article 8 presumably would apply even where there was a mandatory scheme for registration of certain relevant information concerning the fact that an international will has been made but there is no mandatory rule pertaining to the safekeeping of the international will itself. Any residual doubt arises from the fact that the Conference, both in the text of the Uniform Law and in that of the Resolution, was not sufficiently precise in drawing the obvious distinction between the safekeeping of the will and the registration of certain relevant information concerning the fact that an international will has been made.

Article 12

> In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this law.

In accordance with the provisions of this article the statements made by the authorized person in completing the certificate are *prima facie* proof of the fact of compliance with the formalities prescribed by the Uniform Law. Such proof, however, is subject to being rebutted by contrary evidence.

Article 13

> The absence or irregularity of a certificate shall not affect the formal validity of a will under this law.

The provisions of this article make it clear that the accurate completion of the certificate, in whole or in part, is not a condition precedent to the formal validity of the international will and presumably its due execution in accordance with the provisions of the Uniform Law is open to be proved by other evidence.

Article 14

The international will shall be subject to the ordinary rules of revocation of wills.

Although the making of an international will is attended with the special formalities prescribed by the Uniform Law, its revocation may be brought about in accordance with the means stipulated in the applicable law, including the choice of law rules of the forum. The inclusion of this provision in the Uniform Law was not arrived at without considerable debate and difference of opinion. It is difficult to envisage, however, what alternatives would be acceptable, bearing in mind the diverse methods by which wills may be revoked in the various jurisdictions, including the physical destruction of the document itself and, in certain circumstances, the subsequent marriage of the testator.

Article 15

In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity in its interpretation.

The provisions of Article 15 are not dissimilar to the provisions contained in the *Canada Evidence Act*, the provincial evidence acts, and the former model acts of the Conference of Commissioners on the Uniformity of Legislation in Canada. It is hoped, however, that they would be given wider acceptance and more ready application than the corresponding Canadian provisions have received.

Apart from the formal procedures of signing and ratification on behalf of the Province of Ontario by the Government of Canada, under the provisions of Canadian constitutional law the Convention is not self-executing and the implementation of the Convention and the Uniform Law can only be brought about by the enactment of the Uniform Law by the Legislature. The Commission recommends that this be done.

As previously indicated, Article I of the Convention provides that implementation can be achieved by the enactment of the Uniform Law by reproducing the actual text thereof and the introduction into the local law of such further provisions as are necessary to give the provisions of the Uniform Law full effect in the enacting state. It would be open to the Province to do so immediately.

We are informed, however, that a draft model act has been formulated and will be submitted for approval at the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada scheduled to be held in August, 1974. It is our understanding that the draft legislation also contains provisions relating to the Resolution concerning the safekeeping of wills. Since the highest possible degree of uniformity in the implementing legislation amongst the Canadian provinces and territories is desirable, we would respectfully suggest that legislative action

in Ontario might await the settling of the form of the implementing legislation by the Uniformity Commissioners at which time an act would be available as a model for all provinces.

Finally, it is appreciated that by some means the individual provinces will be required to designate those persons who are authorized to act in connection with the international will.

CHAPTER 5

SUMMARY OF RECOMMENDATIONS AND CONCLUSION

Summary of Recommendations

The Commission recommends as follows:

1. That the Government of Ontario request ratification on behalf of the Province of Ontario by the Government of Canada of the Convention Providing a Uniform Will on the Form of an International Will.
2. That the Province of Ontario enact the Uniform Law appearing as the Annex to the Convention together with such further provisions as are necessary to give the provisions of the Annex full effect in this Province.

Conclusion

The Convention and Uniform Law on the form of the international will represents a major advance in the international unification of the rules in a vital area of the law respecting succession to property in the estates of deceased persons. Because its provisions are relatively simple, its impact direct, and the nature of the legal prescriptions so closely akin to our own domestic law that little change in current law and practice is required to accommodate the new procedure, we are of the opinion that it deserves unqualified support in this jurisdiction.

All of which is respectfully submitted.

H. ALLAN LEAL, *Chairman*

JAMES C. McRUER, *Commissioner*

RICHARD A. BELL, *Commissioner*

W. GIBSON GRAY, *Commissioner*

WILLIAM R. POOLE, *Commissioner*

July 3, 1974

APPENDIX A

DIPLOMATIC CONFERENCE ON WILLS

WASHINGTON, D.C.

OCTOBER 16-26, 1973

CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

Convention Providing a Uniform Law on the Form of an International Will

The States signatory to the present Convention,

DESIRING to provide to a greater extent for the respecting of last wills by establishing an additional form of will hereinafter to be called an "international will" which, if employed, would dispense to some extent with the search for the applicable law;

HAVE RESOLVED to conclude a Convention for this purpose and have agreed upon the following provisions:

Article I

1. Each Contracting Party undertakes that not later than six months after the date of entry into force of this Convention in respect of that Party it shall introduce into its law the rules regarding an international will set out in the Annex to this Convention.

2. Each Contracting Party may introduce the provisions of the Annex into its law either by reproducing the actual text, or by translating it into its official language or languages.

3. Each Contracting Party may introduce into its law such further provisions as are necessary to give the provisions of the Annex full effect in its territory.

4. Each Contracting Party shall submit to the Depositary Government the text of the rules introduced into its national law in order to implement the provisions of this Convention.

Article II

1. Each Contracting Party shall implement the provisions of the Annex in its law, within the period provided for in the preceding article, by designating the persons who, in its territory, shall be authorized to act in connection with international wills. It may also designate as a person authorized to act with regard to its nationals its diplomatic or consular agents abroad insofar as the local law does not prohibit it.

2. The Party shall notify such designation, as well as any modifications thereof, to the Depositary Government.

Article III

The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a Contracting Party, shall be recognized in the territory of the other Contracting Parties.

Article IV

The effectiveness of the certificate provided for in Article 10 of the Annex shall be recognized in the territories of all Contracting Parties.

Article V

1. The conditions requisite to acting as a witness of an international will shall be governed by the law under which the authorized person was designated. The same rule shall apply as regards an interpreter who is called upon to act.

2. Nonetheless no one shall be disqualified to act as a witness of an international will solely because he is an alien.

Article VI

1. The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.

2. Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

Article VII

The safekeeping of an international will shall be governed by the law under which the authorized person was designated.

Article VIII

No reservation shall be admitted to this Convention or to its Annex.

Article IX

1. The present Convention shall be open for signature at Washington from October 26, 1973, until December 31, 1974.

2. The Convention shall be subject to ratification.

3. Instruments of ratification shall be deposited with the Government of the United States of America, which shall be the Depositary Government.

Article X

1. The Convention shall be open indefinitely for accession.

2. Instruments of accession shall be deposited with the Depositary Government.

Article XI

1. The present Convention shall enter into force six months after the date of deposit of the fifth instrument of ratification or accession with the Depositary Government.

2. In the case of each State which ratifies this Convention or accedes to it after the fifth instrument of ratification or accession has been deposited, this Convention shall enter into force six months after the deposit of its own instrument of ratification or accession.

Article XII

1. Any Contracting Party may denounce this Convention by written notification to the Depositary Government.

2. Such denunciation shall take effect twelve months from the date on which the Depositary Government has received the notification, but such denunciation shall not affect the validity of any will made during the period that the Convention was in effect for the denouncing State.

Article XIII

1. Any State may, when it deposits its instrument of ratification or accession or at any time thereafter, declare, by a notice addressed to the Depositary Government, that this Convention shall apply to all or part of the territories for the international relations of which it is responsible.

2. Such declaration shall have effect six months after the date on which the Depositary Government shall have received notice thereof or, if at the end of such period the Convention has not yet come into force, from the date of its entry into force.

3. Each Contracting Party which has made a declaration in accordance with paragraph 1 of this Article may, in accordance with Article XII, denounce this Convention in relation to all or part of the territories concerned.

Article XIV

1. If a State has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.

Article XV

If a Contracting Party has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, any reference to the internal law of the place where the will is made or to the law under which the authorized person has been appointed to act in connection with international wills shall be construed in accordance with the constitutional system of the Party concerned.

Article XVI

1. The original of the present Convention, in the English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited with the Government of the United States of America,

which shall transmit certified copies thereof to each of the signatory and acceding States and to the International Institute for the Unification of Private Law.

2. The Depositary Government shall give notice to the signatory and acceding States, and to the International Institute for the Unification of Private Law, of:

(a) any signature;

(b) the deposit of any instrument of ratification or accession;

(c) any date on which this Convention enters into force in accordance with Article XI;

(d) any communication received in accordance with Article I, paragraph 4;

(e) any notice received in accordance with Article II, paragraph 2;

(f) any declaration received in accordance with Article XIII, paragraph 2, and the date on which such declaration takes effect;

(g) any denunciation received in accordance with Article XII, paragraph 1, or Article XIII, paragraph 3, and the date on which the denunciation takes effect;

(h) any declaration received in accordance with Article XIV, paragraph 2, and the date on which the declaration takes effect.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorized to that effect, have signed the present Convention.

DONE at Washington this twenty-sixth day of October, one thousand nine hundred and seventy-three.

* * *

ANNEX

Uniform Law on the Form of an International Will

Article 1

1. A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.

2. The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

Article 2

This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

Article 3

1. The will shall be made in writing.

2. It need not be written by the testator himself.

3. It may be written in any language, by hand or by any other means.

Article 4

1. The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.

2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

Article 5

1. In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.

3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

Article 6

1. The signature shall be placed at the end of the will.

2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

Article 7

1. The date of the will shall be the date of its signature by the authorized person.

2. This date shall be noted at the end of the will by the authorized person.

Article 8

In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

Article 9

The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

Article 10

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE

(Convention of October 26, 1973)

1. I, ... (name, address and capacity), a person authorized to act in connection with international wills

2. Certify that on .....(date) at .....(place)

3. (testator) ..... (name, address, date and place of birth)
in my presence and that of the witnesses

4. (a).....(name, address, date and place of birth)
(b).....(name, address, date and place of birth)
has declared that the attached document is his will and that he knows the contents thereof.

5. I furthermore certify that:

6. (a) in my presence and in that of the witnesses
   (1) the testator has signed the will or has acknowledged his signature previously affixed.
   *(2) following a declaration of the testator stating that he was unable to sign his will for the following reason .....
   – I have mentioned this declaration on the will
   *– the signature has been affixed by .....
   (name, address)
7. (b) the witnesses and I have signed the will;
8. *(c) each page of the will has been signed by ..... and numbered;
9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;
10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;
11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will:
    .....
    .....
12. PLACE
13. DATE
14. SIGNATURE and, if necessary, SEAL

*To be completed if appropriate.

Article 11

The authorized person shall keep a copy of the certificate and deliver another to the testator.

Article 12

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

Article 13

The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

Article 14

The international will shall be subject to the ordinary rules of revocation of wills.

Article 15

In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity in its interpretation.

APPENDIX B

DIPLOMATIC CONFERENCE ON WILLS
WASHINGTON, D.C.

October 16-26, 1973
DC/3
October 25, 1973

RESOLUTION

THE DIPLOMATIC CONFERENCE ON WILLS

CONSIDERING the importance of measures to permit the safeguarding of wills and to find them after the death of the testator;

EMPHASIZING the special interest in such measures with respect to the international will, which is often made by the testator far from his home;

RECOMMENDS to the States that participated in the present Conference:

that they establish an internal system, centralized or not, to facilitate the safekeeping, search and discovery of an international will as well as the accompanying certificate, for example, along the lines of the Convention on the Establishment of a Scheme of Registration of Wills, concluded at Basel on May 16, 1972; and

that they facilitate the international exchange of information in these matters and, to this effect, that they designate in each state an authority or service to handle such exchanges.